Supreme Court, U.S.
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No. ____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 2000

WILLIAM J. GILBERT,

Petitioner

v.

BALTIMORE COUNTY, MARYLAND, et al.,

Respondents

On Petition for Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

JACK L. B. GOHN
Counsel of Record
Gohn, Hankey & Stichel, LLP
Suite 803
401 Washington Avenue
Towson, Maryland 21204
(410) 752-0412

QUESTIONS PRESENTED

In light of the frequency with which genuine disputes of material fact are resolved by trial courts on summary judgment motions, particularly in employment cases, should this Court now resolve ambiguities in its 1986 pronouncements on summary judgment which may have encouraged this approach?

If so, is this an appropriate case in which to address the issue?

LIST OF ALL PARTIES TO THE PROCEEDING

Name of Person	Relationship
William J. Gilbert	Plaintiff and Appellant below
Baltimore County, Maryland	Defendant and Appellee below
Baltimore County Fire Department	Defendant and Appellee below
John Hohman	Defendant and Appellee below, in both personal and official capacity
John F. O'Neill	Defendant and Appellee below, in official capacity only

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I. Medina, A Matter of Fact: Hostile Environments and Summary Judgments, 8 S.CAL. REV. L. & WOMEN'S STUD. 311 (1999) 6

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I. REPORTS OF OPINIONS

The unreported Memorandum Opinion and Order of the United States District Court for the District of Maryland, dated March 2, 2000, is reprinted as Appendix A, at Pages A1-A6. The unpublished ruling of the United States Court of Appeals for the Fourth Circuit, dated September 28, 2000, is reprinted as Appendix B at Pages A7-A14. The unpublished ruling of the United States Court of Appeals for the Fourth Circuit denying rehearing and rehearing en banc, dated November 2, 2000, is reprinted as Appendix C at Pages A15-A16.

II. JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254. This petition is timely filed pursuant to Rules 13.1 and 13.3 of this Court, coming within 90 days of the Order of the Circuit Court (Appendix C) denying rehearing.

III. CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND COURT RULES INVOLVED

Federal Rule of Civil Procedure 56 (Excerpt)

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought

may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

IV. STATEMENT OF THE CASE

Petitioner William J. Gilbert ("Mr. Gilbert") filed a complaint under 42 U.S.C. §1983 on November 12, 1999 in the United States District Court for the District of Maryland, naming four Defendants, Baltimore County, Maryland, the Baltimore County Fire Department, John

F. O'Neill (the Fire Chief) in his official capacity,[1] and John Hohman ("Mr. Hohman"),[2] individually and in his official capacity. The Complaint alleged that Mr. Gilbert was a firefighter in the Department, in the course of which duties he was detailed to search operations with Mattie, a dog specially assigned to him. The Complaint further alleged that Mr. Hohman, an erstwhile official in the union representing the Baltimore County firefighters and present senior departmental official, had conceived a plan, and conspired with others, to subject Mr. Gilbert to bad-faith discipline as a way of retaliating against Mr. Gilbert for his exercise of rights protected directly by the First Amendment and by the Baltimore County Employee Relations Act, Article II of Title 25 of the Baltimore County Code, and indirectly by constitutional guarantees of due process and equal protection under the Fourteenth Amendment of the Constitution. Pendent State law claims were also raised.

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[1] On May 1, 2000, Chief O'Neill announced his retirement, and his interim successor is John Hohman who, as noted above, is sued both in personal and official capacities. Accordingly, if this case is reinstated as Mr. Gilbert requests, it is anticipated that Chief O'Neill will be dropped from the suit, since Mr. Hohman, already a party, has succeeded, at least temporarily, to Chief O'Neill's official capacity.

[2] Mr. Hohman has had various official titles during relevant times and this proceeding, so he is referred to for convenience simply as "Mr. Hohman."

Respondent Baltimore County responded on behalf of all Defendants, now Respondents in this Court.[3] The County moved to dismiss or for summary judgment on the basis that Mr. Gilbert's claims were all directly or indirectly barred by a release he had signed. The release purported on its face to have been signed voluntarily. Mr. Gilbert contended, and submitted an affidavit to that effect, that the release had nonetheless been coerced by a threat to have his search dog destroyed.

On March 2, 2000, by a Memorandum Opinion and Order, the District Court (Smalkin, J.) granted summary judgment for Defendants on the above issues, holding that Mr. Gilbert had failed to establish the existence of a factual issue as to the voluntariness of the release. Absent jurisdiction over the matters the District Court found to have been released by the release in question, there was no other basis for jurisdiction over the other federal claims, and, without a federal claim, no basis for holding in the pendent State law claims. Consequently, the District Court granted summary judgment on all federal claims and dismissed the State law claims.

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[3] In the exchange of memoranda between the parties, Mr. Gilbert stipulated to the dismissal of the Baltimore County Fire Department, but the District Court never specifically responded to this stipulation. So technically the Baltimore County Fire Department is probably an Respondent here (although Respondents have contended the Department lacks the capacity to be sued).

Mr. Gilbert timely appealed to the Fourth Circuit, arguing that the District Court had applied incorrect substantive law, but that, on either the substantive law it relied upon or the law that Mr. Gilbert contended should apply, the District Court had wrongly resolved various genuine disputes of material fact. In an unpublished per curiam opinion dated September 28, 2000, the Fourth Circuit affirmed.

Mr. Gilbert timely sought rehearing or rehearing en banc, which was denied by order of November 2, 2000.

V. REASON FOR GRANTING THE WRIT

A. In light of the frequency with which genuine disputes of material fact are resolved by trial courts on summary judgment motions, particularly in employment cases, this Court should now resolve ambiguities in its 1986 pronouncements on summary judgment which may have encouraged this approach

Something is broken with the summary judgment machinery in our federal judiciary. This may not be apparent at first glance, because summary judgments are clearly being granted at a brisk pace. But a machine with all working parts in order generally contains a functioning "governor," a component that prevents the machinery from working too fast or too indiscriminately. The governor has broken here. The pace of summary judgments has evolved from being a sign of the system's

good functioning to a sign of the opposite. The hallmark of dysfunction is the resolution of factual disputes by the courts on summary judgment motions.

This evolution has been decried both by at least one prominent jurist,[4] and by a wealth of academic commentators,[5] not to mention many appellate panels.[6] Even

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[4] See former Chief Judge Patricia Wald of the D.C. Circuit's article, Summary Judgment at Sixty, 76 TEX.L.REV. 1897 (1998), which has warned that Rule 56 seems to be "develop[ing] ... into a stealth weapon for clearing calendars." Id. at 1898. Because of this, as Judge Wald has said, "we are now at a stage where the focus should be on ensuring that summary judgment stays within its proper boundaries, rather an on encouraging its unimpeded growth." She adds that "Its expansion across subject matter boundaries and its frequent conversion from a careful calculus of factual disputes (or the lack thereof) to something more like a gestalt verdict based on an early snapshot of the case have turned it into a potential juggernaut which, if not carefully monitored, could threaten the relatively small residue of civil trials that remain." Id. at 1917.

[5] See, e.g. T. Beiner, The Misuse of Summary Judgment in Hostile Environment Cases, 34 WAKE FOREST L. REV. 71 (1999); I. Medina, A Matter of Fact: Hostile Environments and Summary Judgments, 8 S.CAL. REV. L. & WOMEN'S STUD. 311 (1999); A. McGinley, Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases,

(continued...)

this Court seems recently to have signaled concern in *Hunt v. Cromartie*, 526 U.S. 541 (1999).[7] The consensus is that courts are trespassing with increasing frequency into the territory Rule 56 purports to reserve for the

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[5](...continued)
34 B.C. L. REV. 203 (1993).

[6] See the cases cited in Beiner, *supra*, at 95, Notes 147 to 153, and those cited in McGinley, *supra*, at 229, Note 119. These cases do not create a classic "split among the Circuits" because they likely occur in Circuits with contrary authority. For instance, Beiner cites a Fourth Circuit ruling, *Beardsley v. Webb*, 30 F.3d 524, 530 (4th Cir. 1994) (directed verdict context), which clearly is in conflict with the sense of the Fourth Circuit panel which decided the present case. So what we have here is a split *within* Circuits. This is a situation which merits the granting of the writ as much as a split *among* Circuits.

[7] In *Cromartie*, this Court overturned a grant of summary judgment for plaintiffs in a claim of race discrimination through gerrymandering. The defense had raised what this Court deemed a colorable claim of permitted political discrimination, and this Court held that an inquiry into whether the discrimination was racial or merely political was warranted. In so doing, this Court cited, 526 U.S. at 552, the first of the couplet of quotations from *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986) rendered below at 11, instead of the second quote, upon which the courts that grant summary judgment generally rely.

jury: the weighing and resolving of disputes of material fact. In particular, these trespasses are observed to occur where the movant is an employer and the party resisting summary judgment is an employee suing the employer on the basis of federal civil rights laws. Frequently, the trespass takes the form of decisions as to what a jury could reasonably conclude about a party's mental state. The end result is that summary judgments are granted against employment plaintiffs with increasing

frequency,[8] and with questionable – and widely questioned – legitimacy.

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[8] The Administrative Office of the United States Courts started posting on its website in 1997 its Director's annual report on the "Judicial Business of the United States Courts." Reports are now available from 1997 to 1999. Table C-4 in each report lists "Civil Cases Terminated, by Nature of Suit and Action Taken" during the 12-month period ending in September of the subject year. For cases in the "Civil Rights - Employment" in 1997, 9.8% reached trial. For that same category, in 1999, only 5.8% reached trial. Significantly, in 1997, 966 cases of 1309, or 74 % were disposed of "Before Pretrial," while in 1999, 1128 of 1463, or 77% were disposed of at that stage. While this statistic presumably includes dismissals as well as summary judgments, it supports at least the notion that the dismissal/summary judgment combination is being used to weed out the vast majority of these cases. Significantly, in both years, the percentage of cases disposed of without court action (presumably by settlement) remained small. Worse, the trend extends to the appellate level. Statistical analysis of appellate sexual harassment cases was performed by Professor Beiner, op.cit., 34 WAKE FOREST L. REV. at 97-102. Beiner noted a trend toward affirmance of summary judgment, largely based on perceptions of lack of severity or pervasiveness. Biener argues these perceptions are then enforced by resort to the wrong side of the very ambiguities in this Court's 1986 pronouncements which this Petition maintains need to be reexamined.

Although a bias against employment plaintiffs is often perceived as one cause,[9] the trial courts are not exclusively blamed for this state of affairs. The commentators cite to one or more of this Court's 1986 summary judgment trilogy: *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and *Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). It is the consensus of the commentators that the "trilogy" was a signal to trial courts to be more proactive in granting summary judgments. It is also the consensus of the commentators that ambiguities and ambivalences in the "trilogy" provide much of the intellectual basis for perceived overreaching by the trial courts.

Specifically, in each of these cases there is language which would appear to discourage trial courts from resolving factual disputes crucial to the outcome, and other language and/or judicial activity which would appear to encourage them to do so.

For instance, consider the following couplet from *Anderson*, the second half of which immediately followed the first in the opinion:

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[9] See, e.g. Report of the Special Committee on Gender, in Gender, Race and Ethnic Bias Task Force Project of the D.C. Circuit, Vol. I, IVA 97-101 (1995), reprinted in 84 Geo. L.J. 1657, 1760-63 (1996), which showed a universal perception, held both by the plaintiffs' bar and the defense bar, that judges were prejudiced against employment plaintiffs.

"...[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for that party." 477 U.S. at 249. If the evidence is merely colorable, or is not sufficiently probative, summary judgment may be granted." 477 U.S. at 249-50. [*Citations omitted.*]

There is in fact no way for a court to determine whether evidence is "merely colorable" or is "not sufficiently probative" without "weigh[ing] the evidence." It is an impossibility. Nor can the injunction against weighing the evidence be squared with application of the *Anderson* Court's respectful citation to *Improvement Co. v. Munson*, 14 Wall. 442, 448 (1872) for the proposition that a mere scintilla is not "evidence ... upon which a jury could properly proceed to find a verdict for the party producing it." 477 U.S. at 251. Only a weighing process can distinguish between a scintilla and whatever is heavier.

Likewise, in *Matsushita*, the Court genuflected to the proposition that where the nonmoving party comes forward with specific facts showing that there is a genuine issue for trial, there should be no summary judgment. 475 U.S. 574, 586-87. But the Court's *action* was to ignore very definite expert testimony that the foreign manufacturers there accused of antitrust violations had violated the law as charged, simply because, in

the Court's own view, engaging in such violations would make no economic sense for the manufacturers. This application of the Court's view of what made sense contradicted what the experts said *had actually occurred*. In other words – and relevant to the present case – the Court had given a signal that mere determination of plausibilities could outweigh actual testimony as to actual events. Moreover, as has often been noted by academic commentators, this holding apparently gives trial judges the license and responsibility to make preliminary assessments as to the thoughts and intentions of the parties, even though these issues are often critical to employment cases.

Celotex is often quoted – and was quoted in both the District Court and Circuit Court rulings in the present case – for the proposition that a non-moving party with the ultimate burden of proof must come forward with some evidence to show it can meet the burden, and cannot rest on the insufficiency of contrary evidence brought forward by the movant. However, when a court, emboldened by *Anderson* and *Matsushita*, first refuses to acknowledge the substantiality of the evidence submitted by the non-moving plaintiff, *Celotex* confirms the trial court's course in granting judgment.

In the hands of trial courts with a bias against employees that may be reflected in its assessments of what is plausible, or what is substantial, the summary judgment trilogy can be improperly employed against, and devastating to employment plaintiffs. And there is a wide consensus, among both employees' and employ-

ers' bars, that this bias is widespread, and far too often outcome-determinative.

It may well be that this is not what this Court intended when it released the trilogy. It may be that this Court intended District Courts to acknowledge the existence of genuine disputes of material fact in employment cases where, as here, the employee swears to having had a certain state of his mind when he executed a release, and the issue is whether he had that state of mind, no matter how unlikely the District Courts might find the claim. Likewise, this Court may not have wanted determinations as to the existence *vel non* of genuine issues to hinge on whether the affidavits establishing those issues are viewed as likely or not. If so, then this would be an excellent case for the Court to revisit these issues, and clear up some of the ambiguities in the 1986 summary judgment trilogy. Mr. Gilbert's case would be an excellent candidate for consideration of these issues not because it is unique but because it is altogether typical – and egregious.

B. This an appropriate case in which to address the issue

1. The Facts

According to affidavit testimony, Mr. Gilbert, a firefighter with the Baltimore County Fire Department, was the victim of an unjustified vendetta waged against him by John Hohman, a supervisor. As a part of this

vendetta, Mr. Hohman caused trumped-up disciplinary charges to be brought against Mr. Gilbert. Mr. Gilbert swore that Mr. Hohman then engineered a "settlement" of those disciplinary charges by confronting Mr. Gilbert with a dilemma: accept the "settlement" or see his beloved search dog Mattie killed. The present action would have been precluded by the settlement if it were given effect. Baltimore County therefore pleaded the settlement as a defense. Mr. Gilbert responded that the settlement was compelled by duress, which would void the settlement. The summary judgment issue confronting the District Court and later the Fourth Circuit, therefore, was whether, on the sworn facts presented, Mr. Gilbert had established facts from which a jury could find the existence of duress.

2. The District Court

The District Court started with an assumption as to what occurred which simply contradicted Mr. Gilbert's account: "There is, however, no indication that there was an immediate threat made to the dog's life on February 24 in order to induce Gilbert to sign the settlement agreement."[10] Then the Court stated the facts which

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[10] The District Court may perhaps felt that this *was* consonant with the record because the threat was not "immediate." It is a possible implication that, because the threat was a threat of delayed action, this might have had a

(continued...)

clearly it found dispositive: The release "was prepared by [Mr. Gilbert's] union representative and signed by him and endorsed by the union representative." From this, the District Court concluded: "[N]o reasonable factfinder could conclude, were the case at the directed verdict stage, that Gilbert's mind was overwhelmed by fear which precluded him from using free will or judgment." In drawing this conclusion, the District Court was relying on the view of the Maryland common law of duress articulated in *Meredith v. Talbot County*, 80 Md.App. 174, 187, 560 A.2d 599 (1998), that "A necessary element of duress is that the actor's state of mind must have been overwhelmed by fear which precluded him from using free will or judgment."

Mr. Gilbert appealed this ruling on the grounds that, *inter alia*, *Meredith* no longer articulated the current elements of duress, and that instead Maryland had

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[10](...continued)
bearing on whether Mr. Gilbert had established what the District Court deemed to be an element of duress: overwhelming fear. However, the Court offered no explanation of why a threat of delayed action would be incapable of inflicting overwhelming fear. So, even if this were the District Court's unarticulated rationale, it would not logically follow. Absent a successful articulation of this or some similar rationale, the "immediacy" of the threat is not relevant. Hence Mr. Gilbert stands by his assertion that the District Court was simply contradicting the record, any notional saving grace in "immediate" being ineffectual.

adopted the Restatement (Second) view,[11] which only calls for leaving the threatened party no reasonable alternative, and that, regardless, the Court was not free simply to disbelieve Mr. Gilbert's account of his state of mind or to conclude that he possessed a reasonable alternative.

3. The Fourth Circuit

At the outset, the Fourth Circuit concluded that Maryland law was not clear as to the elements of duress. The *Meredith* standard required a wrongful act or threat by the other party, overwhelming the complaining party with fear and precluding that party from using free will or judgment. The Restatement (Second) of Contracts standard required a wrongful act or threat which leaves the complaining party no reasonable alternative. It was not clear to the Fourth Circuit whether Maryland had moved to the newer standard. But the Fourth Circuit determined that Mr. Gilbert had failed to "establish" duress under either standard.

Unlike the analysis performed by the District Court, the Fourth Circuit's analysis under both standards set aside the wrongful act or threat element, assuming for the sake of argument that it had been "established." The Fourth Circuit focused, therefore, on the second element under each test.

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[11] As articulated in Restatement (Second) of Contracts §175(1).

As to the second element under the earlier test (being overwhelmed by fear), the Panel relied on four considerations. It will be seen that *none* of these considerations absolutely *compelled* the conclusion that Mr. Gilbert's free will or judgment had been left intact by the threat.

> First, although Gilbert's affidavit states that he would not have signed the agreement if Mattie's life had not been threatened, Gilbert makes it clear that his goal in executing the settlement agreement was not only to save Mattie but also to save his own job. Gilbert's affidavit *suggests* he would not have signed an agreement if it would result in his termination, which in turn *suggests* he was not so overwhelmed with fear that he was unable to exercise his free will.

[*Emphasis added.*] Even if one agrees that the premise that Mr. Gilbert was acting in part to save his job somehow "suggests" a greater play for free will than Mr. Gilbert claims, this is *only a suggestion*, as the Panel's own wording twice acknowledges. The reasoning mind is free to reject it in the light of all the evidence. And if conflicting inferences may be drawn from the evidence, summary judgment should be denied. *Phoenix Sav. & Loan, Inc. v. Aetna Cas. & Sur. Co.*, 381 F.2d 245, 249 (4th Cir. 1967).

The Panel then observed: "Second, Gilbert's own union representative negotiated and drafted the agree-

ment." However, the mere agency of a representative does not automatically inoculate an agreement against duress as a matter of law. See *Hale v. Hale*, 74 Md.App. 555, 539 A.2d 247 (1988) (duress found despite participation of joint counsel); *Perry v. Leeke*, 832 F.2d 837, 844 (4th Cir. 1987) (court looks not to the fact of representation by counsel, but to the "vigor" of that representation, to determine whether confession while represented by counsel was made under duress); *Sanderlin v. Smyth*, 138 F.2d 729, 731 (4th Cir. 1943) (court looks to "competence" of legal counsel to determine whether confession was result of duress). Given a chance, Mr. Gilbert would have produced evidence substantiating the highly equivocal nature of the loyalties of his union representative. Again, therefore, the Fourth Circuit seems to have relied upon a fact which could not be dispositive. Not only that, but the evidence would seem to belie the conclusions reached.

Third, the Fourth Circuit said, "there was no actual threat of immediate harm to the dog, only mere speculation that she might be harmed if she refused to perform for another handler." In so saying, the Panel failed to address, as urged by Mr. Gilbert, the case of *Iozzi v. State*, 5 Md.App. 415, 247 A.2d 758 (1968), *cert. denied*, 253 Md. 734 (1969). As *Iozzi*, an extortion case, made clear, a threat does not have to be explicit. It can be buried in hypotheticals, disavowals, and conditional statements

which can bear an unthreatening meaning.[12] It is a jury issue par excellence, as it involves the weighing of competing inferences. Mr. Gilbert swore that there had been a course of dealings between Mr. Hohman and himself that properly gave the words that very sinister meaning he attributes to them. This cannot be decided on summary judgment.

Finally, the Fourth Circuit concluded:

> Gilbert's affidavit demonstrates that he knew a decision to destroy a search dog would be the subject of "high-level discussions in the Department." In light of this knowledge, *it seems unlikely* that Gilbert believed Hohman possessed the unilateral authority to destroy Mattie.

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[12] See *U.S. v. Maisonet*, 484 F.2d 1356 (4th Cir. 1973) ("as soon as I can get this case situated around in the position I want, you are the first s.o.b. that will go; [the prosecutor] will be next" began as conditional statement, and was capable of bearing an unthreatening meaning; nonetheless whether it was statutory threat is jury issue); *People v. Brooks*, 26 Cal.App.4th 42, 31 Cal.Rptr.2d 283 (1994) (threat applicable only if victim gave testimony could be statutory "threat" despite its hypothetical nature); *Postell v. U.S.*, 282 A.2d 551 (U.S.App.D.C. 1971) (mere fact that threat is premised on non-remote hypothetical does not keep it from being statutory "threat"); *People v. Massengale*, 261 Cal.App.2d 758, 68 Cal.Rptr. 415 (1968) (no form of words necessary; threats can be made by innuendo and the relations between the parties can be considered).

[*Emphasis added.*] Setting aside that the premise here is a totally unwarranted reading of the affidavit,[13] the fact is that again, the Fourth Circuit explicitly acknowledges that it is only working from likelihoods, not certainties. But likelihoods are not a proper basis for summary judgment.[14] Unless the Fourth Circuit could state that it *knew* that Mr. Gilbert understood that Mr. Hohman did not possess such unilateral authority, it could not hold that this factor clearly and unequivocally negated duress.

The Fourth Circuit's analysis was similar with respect to the newer approach to the second element of duress.

First, the Fourth Circuit said:

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[13] The affidavit read, at ¶14: "And there had been high-level discussions in the Department, in my presence, about putting down Barney, a different search dog who suffered from cancer, as a budgetary measure." This does not equate to awareness that similar discussions would occur *with regard to Mattie*. Such an inference would only be correct if the Fourth Circuit had had reason to conclude that Mr. Gilbert believed that the Department was run in a regular way, and that Mr. Hohman would only pursue his vendetta through channels. The Fourth Circuit would have no basis on this record for such a conclusion.

[14] *Federal Sav. & Loan Ins. Corp. v. Williams*, 599 F.Supp. 1184, 1212 (D.Md. 1984) (summary judgment is inappropriate merely because a movant appears more likely to prevail at trial).

> ...Gilbert fails to establish that the settlement agreement was not on fair terms such that the threat was improper under the Second Restatement. Under the terms of the settlement agreement, Gilbert was demoted and transferred rather than terminated, Gilbert was permitted to keep his dog as a pet, and the county agreed to provide free veterinary care, and Gilbert agreed to drop his prior grievances against the department. The terms provide at least some benefit to both parties and cannot be deemed unfair.

The Fourth Circuit made two errors here. Surely, if the question was reached, it was the jury's province, not the Fourth Circuit's, to weigh what is and is not fair.[15] But even if it were a court's province to make such a determination, the equation *benefit to both parties = fair* cannot possibly be the rule of decision. In virtually every case

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[15] Fairness is a jury question. *Hubbard v. Associated Press*, 123 F.2d 864, 867 (4th Cir. 1941). Some examples of similar determinations that are jury questions: validity of a legitimate nondiscriminatory reason for unequal pay (*Fowler v. Land Management Groupe, Inc.*, 978 F.2d 158, 161 (4th Cir. 1992)), deceptiveness of statements made to investors in light of all circumstances (*Sandberg v. Virginia Bankshares, Inc.*, 891 F.2d 1112, 1121 (4th Cir. 1989)), and reasonableness of failure of consignee to read shipping documents before signing (*Chandler v. Aero Mayflower Transit Co.*, 374 F.2d 129 (4th Cir. 1967)).

where duress is invoked to set aside an agreement, that agreement contains *some* terms of benefit to the party asserting duress.[16] (Otherwise the agreement could be overturned for want of consideration without either party resorting to claims of duress.) Of course the fact that Mr. Gilbert obtained some benefits under the Agreement, and the extent of those benefits, are factors to be weighed in determining whether there was duress. But the Fourth Circuit's near-resolution of the issue merely because Mr. Gilbert received some benefits was improper. On that basis, it is doubtful if duress could ever be successfully invoked to overturn *any* agreement.

The Fourth Circuit continued:

> Furthermore, ... Gilbert fails to show that he had no reasonable alternative but to execute the settlement agreement. Hohman's alleged threat was merely a conditional statement that if the dog would not search with another handler, she would be useless to the Department and destroyed.

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[16] For instance, *Williams v. Williams*, 306 Md. 332, 342, 508 A.2d 985 (1986) explicitly contemplates that when an agreement is set aside for duress, the "victim" must restore the "benefits" received. To like effect, see *Blum v. Blum*, 59 Md.App. 584, 595, 477 A.2d 289 (1984), citing 17 C.J.S.Contracts §169 (1963).

This comment once again ignores *Iozzi*. Threats can be buried in conditional language, and *Iozzi* says that it is the jury's role to determine whether a threat exists.

The Fourth Circuit further reasoned:

> Clearly, Gilbert could have declined to execute the settlement agreement and waited to see if the dog would in fact refuse to search with another handler.

This also defies logic: it should be obvious that if Mr. Gilbert "waited to see if the dog would in fact refuse to search with another handler," and the dog fulfilled his prediction, it would then already be beyond Mr. Gilbert's ability to save Mattie. By the terms of the implicit threat, Mr. Gilbert needed to act immediately. Moreover, this analysis assumes that Mr. Hohman would abstain from taking any steps to assure Mattie's failure, and assumes him to be a man of far greater honor than any of the evidence submitted by Mr. Gilbert would suggest.

Finally, the Fourth Circuit said that "Gilbert *may* have been able to pursue a legal remedy to prevent Hohman from killing the dog." This is sheer speculation, and probably unsupportable at that.[17] Speculation

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[17] It is hard to contemplate what remedy Mr. Gilbert may have tried. Lacking any personal ownership interest in Mattie, he would probably have failed to demonstrate

(continued...)

is in any case a totally unacceptable basis for resolving summary judgment motions. *Macke Laundry Service Ltd. Partnership v. Alleco Inc.*, 743 F.Supp. 382, 387 (D.Md. 1989).

4. Analysis

In sum, the Fourth Circuit's analysis rested on speculation, suggestions and likelihoods rather than on a dispassionate attempt to determine whether there really was a genuine dispute of material fact or not. Although a bit of an extreme case, the Fourth Circuit's work here, like the District Court's, was little more than a logical extrapoation of ambiguities in *Matsushita* and *Anderson*. If, despite the prohibition against "weighing" evidence, the Fourth Circuit felt free to ignore Mr. Gilbert's affidavit testimony as to his state of mind merely because Mr. Gilbert was represented and because his representative had been scrivener of the agreement – if, in short, the Fourth Circuit felt free to weigh Mr. Gilbert's testimony anyway, this was probably because *Anderson also* says that "merely colorable" or not "suffi-

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[17](...continued)
the heightened interest which generally is a prerequisite to standing in suits against the Government, or to damages cognizable under the Maryland Tort Claims Act. Add to that sovereign immunity and public official immunity, and a way of achieving leverage in this situation does not quickly suggest itself.

ciently probative" evidence can be discarded. It is also because *Matsushita* in fact permitted the balancing of "plausibility" against sworn allegations as to a party's state of mind. And a court emboldened in this way will rapidly progress to refusing to acknowledge the existence a threat not stated *in haec verba*, even when the innuendo is properly alleged and supported. And having negated all the bona fide evidence which a plaintiff has put in the record, a court may well feel that *Celotex* blesses the slamming of the door to any further relief.

It is believed and hoped that these results were not what this Court contemplated in 1986. It is time to revisit the issue and correct these enormities.

VI. CONCLUSION

For all these reasons, this Court should grant certiorari to consider the presented questions.

Respectfully submitted

JACK L. B. GOHN
Counsel of Record
Gohn, Hankey & Stichel, LLP
Suite 803
401 Washington
Avenue
Towson, Maryland 21204
(410) 752-0412

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM J. GILBERT

v. Civil No. S. 99-3384

BALTIMORE COUNTY,
MARYLAND
BALTIMORE COUNTY
FIRE DEPARTMENT
JOHN HOHMAN
JOHN F. O'NEILL

MEMORANDUM OPINION

This is a civil rights case, with a pendent state-law claim, arising from discipline imposed upon the plaintiff by one of his supervisors in the Baltimore County Fire Department. The gist of the plaintiff's federal claim is that he was deprived of numerous federally-protected rights because the supervisor in question acted unfairly and improperly, in an effort to retaliate against the plaintiff for things that happened in a union election years before the discipline was imposed. The matter is before the Court on the defendants' alternative motion to dismiss, or for summary judgment, which has been fully briefed. No oral argument is needed. Local Rule 105.6 D. Md.

Plaintiff and his attorney state that this suit was filed as a means "to preserve his rights," Pl's Opp. Memo at 8, with regard to claims that had been fully settled by a settlement

agreement entered into by the Plaintiff on February 24, 1997 at the conclusion of settlement proceedings during which Mr. Gilbert was represented by an official of his union. the settlement was stated to be a "full and complete settlement of the charges and specifications against Lt. William J. Gilbert", and states as follows: "Both parties agree that the settlement provisions have been entered into voluntarily."

From the plaintiff's submission in opposition to summary judgment, it is apparent that plaintiff does not contest the defendant's position that the settlement agreement released and settled all claims, including the federal claims asserted in the present complaint, arising from the allegedly improper disciplinary actions taken against Gilbert, which form the gist of this action. Plaintiff's position is that, contrary to the statement contained therein, the settlement was not voluntary, but was the product of coercion and duress, because a threat had earlier been made at some point to "put down" the Baltimore County Rescue dog Mattie, which had previously been assigned to Gilbert. The settlement agreement provided, *inter alia*, that Mattie would be retired from the Search and rescue Team and that Gilbert would be allowed to keep Mattie, with the Fire Department continuing to provide veterinary care for the dog.

When a properly-supported motion for summary judgment is made, the opponent must come forward with evidence sufficient to generate a triable dispute. *See Celotex Corp. v. Cattrett*, 477 U.S. 317 (1986) and *Anderson v. Liberty, Lobby, Inc.*, 477 U.S. 1242 (1986). Plaintiff has not done so in this case.

Mr. Gilbert, by affidavit, claims that he had the agreement "forced upon me," and signed it only "in order to save Mattie's life." There is, however, no indication that there was an immediate threat made to the dog's life on February 24 in

order to induce Gilbert to sign the settlement agreement. Gilbert acknowledged that he knew the dog was County property, and that the County could do with it as it wished. Under these circumstances, Gilbert has not generated a triable issue under the law of coercion and duress as applicable to contracts, both generally and in Maryland. Gilbert has a "heavy burden" in attempting to attack the voluntariness of the settlement on the grounds of duress *post hoc*, especially as it was prepared by his union representative and signed by him and endorsed by the union representative. *See, e.g., Harris v. Dept. of Veterans Affairs*, 142 F.3d 1463, 1468 (Fed. Cir. 1998). A necessary element of duress is that the actor's state of mind must have been overwhelmed by fear which precluded him from using free will or judgment. *See Meredith v. Talbot County*, 80 Md.App. 174, 187 (1998). Here, even if the previous "threats" to have the dog put down were "wrongful," *see id.*, no reasonable factfinder could conclude, were the case at the directed verdict stage, that Gilbert's mind was overwhelmed by fear which precluded him from using free will or judgment. The fact that he regrets having entered into the settlement agreement is beside the point and does not invalidate it.

To the extent that Gilbert asserts any federal claims not barred by the settlement agreement, they are barred by limitations, as there are no facts generating a triable dispute under any "continuing violation" theory.

Because the federal claims have been dismissed, the supplemental, state law claim will also be dismissed, for lack of federal subject matter jurisdiction, pursuant to 28 U.S.C. §1367(c)(3).

Frederic N. Smalkin
United States District Judge

Dated: March 2nd, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM J. GILBERT

v. Civil No. S. 99-3384

BALTIMORE COUNTY,
MARYLAND
BALTIMORE COUNTY
FIRE DEPARTMENT
JOHN HOHMAN
JOHN F. O'NEILL

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is, this 2nd day of March, 2000, by the Court, ORDERED:

1. That defendant's alternative motion for summary judgment BE, and it hereby IS, GRANTED as to all federal claims;

2. That judgment BE, and it hereby IS, ENTERED in favor of all defendants against the plaintiff, with costs, on all federal claims;

3. That the state-law claim BE, and it hereby IS, DISMISSED, for lack of federal subject-matter jurisdiction, pursuant to 28 U.S.C. 1367(c)(3); and

4. That the Clerk of the Court mail copies hereof and of the foregoing Memorandum Opinion to counsel for the parties.

Frederic N. Smalkin
United States District Judge

Appendix B
UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WILLIAM J. GILBERT, Plaintiff-Appellant,

v.

BALTIMORE COUNTY, MARYLAND; BALTIMORE COUNTY FIRE DEPARTMENT; JOHN HOHMAN; JOHN

F. O'NEILL, Chief, Defendants-Appellees.

No. 00-1395.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Frederic N. Smalkin, District Judge.
(CA-99-3384-S).

Submitted: Aug. 15, 2000
Decided: Sept. 28, 2000

Before LUTTIG and MOTZ, Circuit Judges, and
HAMILTON, Senior Circuit Judge

Affirmed by unpublished per curiam opinion.

COUNSEL

Jack L.B. Gohn, Gohn, Hankey & Stichel, L.L.P., Towson, MD, for appellant. Virginia Wood Barnhart, County Attorney, James J. Nolan, Jr., Assistant County Attorney, Towson, MD, for appellees.

Unpublished opinions are not binding precedent in this circut. See Local Rule 36(c).

OPINION

PER CURIAM:

William J. Gilbert appeals the district court's order granting summary judgment to the Defendants on some claims and dismissing the remaining claims. We affirm.

Gilbert is a firefighter with the Baltimore County Fire Department (the "Department"). On February 10, 1997, Gilbert's supervisor, John Hohman, ordered Gilbert to answer questions as part of an internal investigation. When Gilbert refused, Hohman suspended him and requested that his superior file "Charges and Specifications" against Gilbert recommending his termination for the failure to obey a direct order.

Gilbert planned to file grievances contesting both the suspension and the proposed termination. However, on February 24, 1997, Hohman advised Gilbert that during the pendency of the proceedings, which would be approximately thirty days, Gilbert's search and rescue dog "Mattie" would be reassigned to work with another firefighter. Gilbert stated that Mattie probably would not search properly for another handler. Hohman replied that if Mattie failed to search, she

would be useless to the Department and would be destroyed.* Gilbert believed this to be a threat against Mattie's life. Gilbert thereafter permitted his union representative to negotiate a settlement with the Department that would allow Gilbert to keep his job and prohibit the Department from destroying Mattie. After several drafts, Gilbert executed a Memorandum of Settlement toward the end of the day on February 24, 1997. The agreement stated that "the settlement provisions [are] entered into voluntarily" and constitute a "full and complete settlement of the charges and specifications against Lieutenant William J. Gilbert." The terms of the agreement provided for Gilbert's demotion and transfer rather than his termination, required Gilbert to write letters of apology, and required Gilbert to forfeit his grievances on leave and compensatory time issues. The agreement also provided for Gilbert's resignation from the search and rescue team. The Department agreed to retire Mattie to the care of Gilbert and agreed to provide her veterinary care.

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* Hohman denies making this statement or having any conversation at all with Gilbert between February 10 and February 24, 1997. (JA 35). For purposes of appellate review, however, we have assumed that truth of the version of events proffered by Gilbert. *See Scheduled Airline Traffic Offices, Inc. v. Objective, Inc.*, 180 F.3d 583, 591 (4th Cir.1999).

Gilbert alleges that he subsequently attempted to overturn the settlement agreement through negotiations until November of 1999. At that time, Gilbert filed the instant § 1983 suit alleging that Baltimore County, the Baltimore County Fire Department, and two fire department officials interfered with his constitutional rights. The Defendants moved for summary judgment on a number of grounds, and Gilbert filed a response in opposition. The district court granted summary judgment, finding that the settlement agreement barred most of the federal claims and dismissing the remainder as barred by limitations. The court then dismissed the state law claims for lack of jurisdiction. Gilbert timely appeals.

This Court reviews de novo a district court's order granting summary judgment and views the facts in the light most favorable to the nonmoving party. See *Scheduled Airlines Traffic Offices, Inc. v. Objective, Inc.*, 180 F.3d 583, 590-91 (4th Cir.1999). Summary judgment is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c). Once the moving party discharges its burden by showing that there is an absence of evidence to support the nonmoving party's case, *see Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986), the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Summary judgment will be granted unless a reasonable jury could return a verdict for the nonmoving party on the evidence presented. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

Maryland courts have employed several tests to determine whether an agreement is voidable for duress. Courts initially inquired as to whether the complaining party's execution of the document was "induced by harshness and threats, and the exercise of unwarrantable authority, so excessive as to subjugate and control the freedom of (the signatory's) will." *Central Bank v. Copeland*, 18 Md. 305, 319 (1862). In conjunction with the Restatement (First) of Contracts, Copeland established two elements of duress: (1) a wrongful act or threat by the other party; and (2) the complaining party was overwhelmed by fear and precluded from using free will or judgment. *See Food Fair Stores v. Joy*, 283 Md. 205, 217 (1978). To be "wrongful," the threat need not be illegal. *See Eckstein v. Eckstein*, 38 Md.App. 506, 515 (1978). However, for a lawful threat to be wrongful, the means must be used so oppressively as to constitute an abuse of legal remedies. *See Food Fair Stores*, 283 Md. at 217. Traditionally, courts focused on the effect of the threat on the signatory more so than on the wrongfulness element. *See id.* at 218.

The Restatement (Second) of Contracts, however, shifted the focus to the nature of the threat itself, omitting the requirement of overwhelming fear. *See Restatement (Second) of Contracts* § 175 cmt. b (1981). Under the Restatement (Second), a contract is voidable if a party is induced by an improper threat that leaves him no reasonable alternative. *See Restatement (Second) of Contracts* § 175(1) (1981). "A threat, even if improper, does not amount to duress if the victim has a reasonable alternative to succumbing and fails to take advantage of it." *Restatement (Second) of Contracts* § 175 cmt. b (1981). The Restatement further states:

A threat is improper if the resulting exchange is not on fair terms, and

a. the threatened act would harm the recipient and would not significantly benefit the party making the threat;
b. the effectiveness of the threat ... is significantly increased by prior unfair dealing by the party making the threat; or
c. what is threatened is otherwise a use of power for illegitimate means.
Restatement (Second) of Contracts § 176(2) (1981).

The *Food Fair Stores* court identified the two possible tests for duress, but did not explicitly decide which test constituted Maryland law. Rather the court applied both tests and found that the claim of duress in that case failed under both. Lower courts, including the district court in the instant case, have continued to address duress claims under the two-element test developed from *Copeland* and the First Restatement. *See Meredith v. Talbot County*, 80 Md.App. 174, 183 (1989); *Blum v. Blum*, 59 Md.App. 584, 594 (1984). Gilbert argues on appeal that the Second Restatement governs Maryland law on the issue of duress. We need not decide which test is actually the law as Gilbert fails to establish duress under either the First Restatement approach or the Second Restatement approach.

Under the two-element test applied in *Copeland* and *Meredith*, Gilbert must establish that his supervisor's threat was wrongful and that Gilbert was overwhelmed with fear and unable to exercise his own judgment when he executed the settlement agreement. Several facts indicate that Gilbert was not actually overwhelmed with fear. First, although Gilbert's affidavit states that he would not have signed the agreement if Mattie's life had not been threatened, Gilbert makes it clear that his goal in executing the settlement agreement was not only to save Mattie but also to save his own job. Gilbert's affidavit suggests he would not have signed an agreement if it

would result in his termination, which in turn suggests he was not so overwhelmed with fear that he was unable to exercise his free will. Second, Gilbert's own union representative negotiated and drafted the agreement. Third, there was no actual threat of immediate harm to the dog, only mere speculation that she might be harmed if she refused to perform for another handler. And finally, Gilbert's affidavit demonstrates that he knew a decision to destroy a search dog would be the subject of "high-level discussions in the Department." In light of this knowledge, it seems unlikely that Gilbert believed Hohman possessed the unilateral authority to destroy Mattie. Thus, even assuming that Hohman's threat was wrongful, Gilbert fails to satisfy the second element of duress under *Copeland* and *Meredith*.

Under the Second Restatement's approach, Gilbert must show that there was an improper threat that left Gilbert no reasonable alternative but to execute the settlement agreement. Even assuming that Hohman's statement was a wrongful exercise of power, Gilbert fails to establish that the settlement agreement prepared by Gilbert's union representative was not on fair terms such that the threat was improper under the Second Restatement. Under the terms of the settlement agreement, Gilbert was demoted and transferred rather than terminated, Gilbert was permitted to keep his dog as a pet and the county agreed to provide free veterinary care, and Gilbert agreed to drop his prior grievances against the department. The terms provide at least some benefit to both parties and cannot be deemed unfair.

Furthermore, even if the threat was improper, Gilbert fails to show that he had no reasonable alternative but to execute the settlement agreement. Hohman's alleged threat was

merely a conditional statement that if the dog would not search with another handler, she would be useless to the Department and destroyed. Clearly, Gilbert could have declined to execute the settlement agreement and waited to see if the dog would in fact refuse to search with another handler. Moreover, Gilbert may have been able to pursue a legal remedy to prevent Hohman from killing the dog. Thus, Gilbert fails to establish duress under the Second Restatement.

We find no reversible error and affirm the order of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
November 2, 2000

No. 00-1395
CA-99-3384-S

WILLIAM J. GILBERT

Plaintiff - Appellant

v.

BALTIMORE COUNTY, MARYLAND; BALTIMORE COUNTY FIRE DEPARTMENT; JOHN HOHMAN; JOHN F. O'NEILL, Chief

Defendants - Appellees

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court

/s/ Patricia S. Connor
CLERK